

March 2006

from the IP and Technology Unit

IT PROCUREMENT - PROTECTING AGAINST DELAY AND NON- DELIVERY

Most businesses are now familiar with the rigours of an IT procurement process and it seems to be generally accepted that this process *will* overrun. It is for this reason that a well thought-out contract is essential for both the customer and the supplier. Some recent court cases have highlighted crucial aspects which can be overlooked.

One of the most important issues for the customer in any contract is knowing that the supplier is responsible when the product fails or causes the customer loss. IT contracts looking purely at the liability for the finished product may often leave the customer short-changed. The supply of an IT system will usually be a lengthy process and therefore there will be an additional period of "installation time" for which no provision is made. There must be liability and compensation provisions covering the period of time during the supply and installation (i.e. before the finished product is handed over). This breaks down into remedies for delay in implementation (most likely financial penalties) and also remedies and compensation where the system is never actually delivered. Where the contract only refers to liability of the finished product the supplier may be free to walk away if a working system is never delivered.

Another issue arises even where there is a penalty provision for delay. In most cases such a penalty will be capped, for example 5% of the contract price. The problem arises when no limit is placed on the length of time that the cap applies. If the cap is a percentage of the contract price a supplier might be in a better position if it continues to delay rather than providing a defective or sub-standard system which may then allow the customer to claim greater compensation. What is required is a provision in the contract that the supplier will only be allowed to delay for a maximum of, say, four months after which time the customer will have the option to terminate the contract and claim compensation.

These points are also relevant to the supplier and both parties should keep the following in mind when entering the procurement process:

- always have a written contract because whatever the supplier's sales pitch, things will often go wrong;
- consider the problems which may be incurred during the supply process, not just those caused by the finished product;
- agree financial compensation for delay - to act as a motivator for the supplier to get back on track;
- only allow the delay to go on for so long;
- keep good records/evidence of any loss incurred;
- consider what happens if the supplier cannot provide the system – is there to be a refund of all monies, removal of software, ability to continue to use what has already been done?

For further information on IT procurement contracts, either from the point of view of the customer or the supplier please contact:

Lester Cameron (LFCameron@paul-williamsons.co.uk)

Greig Morrison (GMorrison@paul-williamsons.co.uk)

Pauline Cordiner (PACordiner@paul-williamsons.co.uk)

